

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JENNIFER AUGUST,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 3180-VCS
DAVID AUGUST, SALLY EDER, and)	
DAVID AUGUST, D.O., CO., a Delaware)	
corporation,)	
)	
Defendants.)	

MEMORANDUM OPINION AND FINAL JUDGMENT

Date Submitted: December 16, 2008
Date Decided: February 20, 2009

Jennifer August, Rehoboth Beach, Delaware, *Pro Se Plaintiff*.

John A. Sergovic, Esquire, SERGOVIC & CARMEAN, P.A., Georgetown, Delaware,
Attorney for Defendant Sally Eder.

STRINE, Vice Chancellor.

I. Introduction

In this case, a creditor plaintiff seeks restitution from the recipient of a fraudulently transferred house who has already voided the transfer, but did so only after the house had lost substantial value as a result of both the recent turmoil in the real estate markets and other events detailed below, leaving the plaintiff unable to satisfy her claims against the debtor-transferor because the house is now worth less than the mortgage a bank holds on it.

The plaintiff, Jennifer August, is the former wife of defendant David August. In February 2007, an insolvent David August fled from the United States to Israel amid mounting child support and alimony debts owed to Jennifer August. Once in Israel, David August quitclaimed his house in Delaware (the “Property”) to his mother, defendant Sally Eder, who resides in Michigan. Eder then began maintaining the Property by making interest-only mortgage payments of approximately \$1,000 a month and paying for utilities and landscaping. At David August’s direction, Eder also listed the Property for sale through a real estate agent in April 2007. At trial, Eder claimed her intent in selling the Property was to secure the equity in it for the benefit of David and Jennifer August’s three children. But, for reasons developed more fully below, I find that Eder’s true purpose was to shield her son from his legal and financial obligations and to put his assets out of Jennifer August’s reach.

In July 2007, Eder entered into a sales contract with a purchaser for \$315,000. After closing costs and satisfaction of the senior mortgage held on the Property by Washington Mutual Bank (the “WaMu Mortgage”), this sale would have yielded

proceeds of approximately \$50,000. But, Eder was unable to close this sale because of a lis pendens Jennifer August had placed on the Property in connection with a judgment lien she held to satisfy David August's unpaid support obligations. While the sales contract was still pending, both David August's attorney, H. Alfred Tarrant, Jr., and David August's father, Irving August, tried to convince Jennifer August to lift the lis pendens by proposing that, if Jennifer August allowed the sale to go through, Eder would place the proceeds in escrow until the parties had agreed on what to do with them. These offers were conditional and suggested that Jennifer August's ability to collect would be limited. For example, the letters claimed that Eder held a valid mortgage on the Property that she might seek to enforce based on a mortgage David August had recorded nearly three years after his mother gifted him money for a down payment on the Property and at a time when David August was acknowledged to be insolvent. Thus, Eder wielded the threat that she would seek any excess equity for herself personally. Even Eder's softer proposals invoking compromise were highly conditional. For example, Tarrant informed Jennifer August that his litigation fees would come out of the escrow account. And, Irving August's letter suggested that Jennifer August and Eder would have to agree on how Jennifer August would use the proceeds — i.e. whether they would go to child support, alimony, or a college fund — before she could receive them in a settlement with Eder. Based in part on her belief that these offers were an attempt to force her to extinguish valid claims, Jennifer August ultimately did not lift her lis pendens, thereby blocking the sale by preventing Eder from conveying clear title. Jennifer August then

initiated this suit in August 2007 seeking a variety of remedies for the allegedly fraudulent transfer of the Property from David August to Eder.

As this action was proceeding, a number of important events occurred. First, in October 2007, Eder quitclaimed the Property back to David August. Also in October 2007, Jennifer August learned that the Property had been stripped of its major appliances, including crucial elements of the HVAC system — vandalism and theft that substantially lowered the value of the Property and that seems likely to have been directed by David August himself. Then, in March 2008, after repeated failures by David August to appear in these proceedings, this court entered a default judgment against him, effectively deeming the transfer of the Property from him to Eder a fraudulent one. This default judgment allowed Jennifer August to exercise all rights of ownership over the Property to maximize her recovery. But, by this time Jennifer August was unable to find a purchaser who was willing to buy the Property for enough to satisfy the outstanding WaMu Mortgage balance, a fact attributable to both the stripped appliances and the general weakening in the real estate market occurring at the time. Jennifer August was thus unable to recover any money from the Property.

Jennifer August continued to seek full restitution for the fraudulent transfer of the Property from Eder under the broad remedies of Delaware’s Uniform Fraudulent Transfer Act (the “UFTA”). Eder, for her part, argued that Jennifer August had received the only remedy she was equitably entitled to, namely the voiding of the transfer, and, moreover, that Jennifer August was barred from further recovery based on her own failure to

promptly execute her judgment lien on the Property and her refusal to accept the offers made to her regarding the sale of the Property.

In this post-trial opinion, I find that Jennifer August is entitled to recover \$40,950 from Eder. This amount represents the equity that was available in the Property at the time David August quitclaimed it to Eder minus the approximately \$8,850 required to realize that equity – i.e., the money required to service the WaMu Mortgage and maintain the Property until a purchaser could be located. This remedy is consistent with the principle expressed in both the UFTA and our common law that the victim of a fraudulent transfer may seek full economic restitution from a transferee, even where the transferee herself did not engage in unconscionable conduct and even where the fraudulently transferred asset has since dissipated. And, this remedy is equitable in light of the purposeful and calculated steps Eder herself took to prevent Jennifer August from satisfying David August's support obligations through the Property.

In addition, I reject the equitable defenses raised by Eder against further recovery by Jennifer August. The first defense, which argues that it was inequitable for Jennifer August's to refuse to lift her *lis pendens* and prevent the realization of the equity in the Property before market prices fell further, fails because Jennifer August did not act improperly in doing so. The offers she received from Eder and those acting on behalf of Eder were highly conditional and suggested that Jennifer August might lose some or all her claims to the Property if she agreed to them. In other words, these were not unequivocal and unconditional attempts to undo the fraudulent transfer, but instead attempts to negotiate over terms that Eder, as the recipient of a fraudulent transfer, had no

right to dictate in the first place. Jennifer August was therefore not required by equity to accept these offers.

The second defense, based on the doctrine of laches, fails because Jennifer August did not unreasonably delay her claims in a way that prejudiced Eder. Jennifer August initiated this suit well within the four-year time window indicated by the UFTA, and Jennifer August in no way acted in a manner that might have reasonably led Eder to believe that she would not be pursuing her claims against the Property.

Thus, Eder has not established an equitable defense, and I enter a judgment against her in favor of Jennifer August.

II. Factual Background

A. The Parties

The plaintiff in this action, Jennifer August, is a freelance graphic designer residing in Delaware. She and defendant David August were divorced in July 2003 after ten years of marriage. Jennifer August has sole custody of the couple's three children, who are now fourteen-, twelve-, and ten-years-old.

Defendant David August is a psychiatrist who, until late 2006, operated a private psychiatric practice in Delaware, defendant David August, D.O., Co. In February 2007, David August fled the United States and began living as a fugitive from a capias order for his arrest stemming from unpaid child support obligations. As explained further below, a default judgment has already been entered in this action against David August and David August, D.O., Co.

Defendant Sally Eder is David August's mother and resides in Michigan.¹

B. David August Purchases The Property

In October 2003, a newly-divorced David August purchased the Property, located at 55 Comanche Circle, Millsboro, Delaware, for \$322,000. He borrowed \$241,500 of the purchase price from Washington Mutual Bank,² and paid the rest using a gift of cash received from his mother, defendant Sally Eder.³ Nearly three years later, in April 2006, when David August was, as we shall see, facing extensive financial difficulties, he executed a mortgage in favor of his mother for \$80,000 based on this advancement (the "Second Mortgage").⁴

C. The Family Court Enters Its Support Order

At the time David August moved into the Property, the legal battles between him and Jennifer August related to their July 2003 divorce were still ongoing. For the next two years, they engaged in what the Family Court for Sussex County itself characterized as "contentious" proceedings.⁵ These proceedings ultimately resulted in a January 2006 order finalizing the amounts David August was to pay in child support and alimony (the "Family Court Order").⁶ David August was already experiencing financial trouble at the

¹ The complaint in this action also names Anthony Morabito, a friend of David August, as a defendant for his alleged involvement in the subject transactions. The claims between him and Jennifer August have since been settled.

² JX-4.

³ Sally Eder wrote David August a check for \$88,000 marked "Gift to David August." PX-3.

⁴ JX-1. It is unclear from the record why the Second Mortgage was for \$80,000 rather than the balance of the purchase price of \$80,500.

⁵ JX-9 at 1, 26-27 (Family Court Ancillary Order of January 30, 2006).

⁶ *Id.*

time, having filed for Chapter 13 bankruptcy in 2004,⁷ and quickly fell behind on his obligations under the Family Court Order.

As David August's debts grew, Jennifer August filed a number of arrears petitions with the Family Court, culminating in an attachment award on all or almost all of David August's income.⁸ The attached income apparently was not enough to satisfy the growing arrearages, and in September 2006, Jennifer August obtained a judgment lien against David August's property in the Superior Court (the "Superior Court Lien").⁹ When it was filed, the Lien was for approximately \$16,000, but the Lien would automatically increase as arrearages accrued.¹⁰

In conjunction with obtaining the Superior Court Lien, as well as a Supreme Court decision affirming the Family Court Order, Jennifer August recorded a lis pendens against the Property in December 2006.¹¹ But, Jennifer August took no further action to execute on the Superior Court Lien. At the time, David August was still in Delaware, had joint custody of the children, and the children spent time with him there. At trial, Jennifer August testified that she did not want to levy on her children's second home.¹² Nor did Jennifer August formally challenge the Second Mortgage that David August had recorded in April 2006, and whose execution, Jennifer August testified, was inspired by a request she made to the Family Court to sequester David August's property to satisfy his

⁷ JX-11.

⁸ JX-10 at 2.

⁹ JX-5; JX-6. The judgment had been transferred to the Superior Court by a permanent contempt order issued by the Family Court. *Id.*

¹⁰ JX-6; Tr. at 320-21.

¹¹ JX-8.

¹² Tr. at 323.

overdue obligations. She testified that she “made the Family Court aware” of the Mortgage and complained to David August about it, but did not then bring a formal claim under the Uniform Fraudulent Transfer Act or other cause of action at the time.¹³

D. David August Absconds And Quitclaims The Property To Eder

The state of David August’s financial affairs and support obligations continued to deteriorate until February 2007. On February 6, 2007, Jennifer August filed for emergency relief from the Family Court and alleged that David August planned to flee the country.¹⁴ Her suspicions turned out to be correct, and on February 14, David August flew to Israel, just two days ahead of the issuance of a Family Court order directing him not to leave the United States and to surrender his passport.¹⁵

David August left for Israel from Florida, where he went to visit his mother, Sally Eder, at her vacation home.¹⁶ Eder admitted that she knew at the time that David August “had no money” and was in fear that he would be arrested in connection with his ongoing legal troubles.¹⁷ Given all the circumstances, there is no reasonable doubt that Eder knew her son was fleeing the United States and intended to dishonor his legal obligations to Jennifer August and his children. According to Eder, it was unclear when David August left how long his self-imposed exile would last.

To prevent, or at least impede, Jennifer August from collecting on her claims in his absence, David August took steps to place his assets out of reach. This included

¹³ Tr. at 322-23.

¹⁴ JX-10 at 4.

¹⁵ *Id.*; JX-9.

¹⁶ Tr. at 10.

¹⁷ Tr. at 8; *see also* Tr. at 198 (Eder: “He was insolvent when he went to Israel.”).

concerted action with his mother, Eder. On February 26, David August executed a quitclaim deed in Israel for the Property in favor of Eder that declared itself a deed in lieu of foreclosure on the Second Mortgage (the “Quitclaim Deed”).¹⁸ The Deed was recorded by David August’s lawyer, H. Alfred Tarrant, Jr., on March 23 in the Sussex County Recorder’s Office.

At trial, Eder’s recollection as to when she learned about the Quitclaim Deed was somewhat muddled and, in my view, entirely unconvincing. But, two things are readily apparent from her testimony. First, Eder remained in regular contact with her son after his departure, provided him with financial support, and coordinated various activities on his behalf, including making a payment on the WaMu Mortgage,¹⁹ wiring money to him in Israel,²⁰ and sending him household items that he requested.²¹ Second, Eder admitted that she was aware of the Quitclaim Deed by late March or early April. Eder testified that she first became aware of the Quitclaim Deed when her son’s lawyer, Tarrant, sent her a copy of it around the time it was recorded. Eder further testified that she understood, either from conversations with Tarrant or David August, that she had received the Quitclaim Deed because David August “wanted to protect the equity in the house because he wasn’t sure how long he was going to be gone. And he wanted me to take care of the house and make sure that there was, you know, somebody looking after

¹⁸ JX-2.

¹⁹ JX-20 (check to Washington Mutual dated 2/20/07).

²⁰ PX-64.

²¹ Tr. at 13.

the house.”²² Accordingly, Eder took over the WaMu Mortgage on David August’s behalf, paid utility bills, and hired landscapers to maintain the Property.²³

I, frankly, do not believe Eder’s denial of involvement in the transfer. The Property was bought with a gift from Eder, and she and her ex-husband, Irving August, who was David August’s father and a former lawyer himself, were deeply involved with David August in helping him manage the legal challenges he faced from Jennifer August.²⁴ Given these realities, and given that David August was with Eder *before* he fled to Israel and within two weeks of his departure executed the Quitclaim Deed, it is more probable that this method of avoiding Jennifer August’s claims was conceived with Eder’s knowledge and participation. Eder is not an unsophisticated person; she is a person of some means who is intelligent and strong-willed. The Quitclaim Deed likely did not just happen to her; it likely happened with her assent. Eder did not want the house she bought for her beloved son falling into his ex-wife’s clutches. Eder’s over-the-top loyalty to her son manifested itself in a deep antipathy toward his ex-wife, Jennifer August. Eder believed Jennifer August was driving her son abroad by making unreasonable financial demands and endangering his mental health.²⁵

Jennifer August became aware of the Quitclaim Deed shortly after it was recorded, when she discovered it at the Recorder’s Office.²⁶ She first confronted Eder about it on

²² Tr. at 26.

²³ JX-20; JX-21.

²⁴ This assistance included Eder and Irving August jointly paying David August’s legal bills to Tarrant. Tr. at 67-68.

²⁵ *E.g.*, Tr. at 7-9.

²⁶ Tr. at 250.

April 1, when Eder called Jennifer August's home to speak to her grandchildren.²⁷ Characteristic of many of their interactions, this call involved more talking past one another than productive conversation. On the call, Jennifer August informed Eder that David August had transferred the deed to his house to Eder. Eder's response was that she wanted to talk to her grandchildren. Jennifer August then proceeded to explain "You have put yourself in a fraudulent situation, and I have two liens on the house right now . . . So right now, you have inherited those, and put yourself in a bad very situation."²⁸ Apparently realizing she would not be getting through to her grandchildren, Eder hung up, saying she would call back later. At trial, Eder claimed she did not know at the time what Jennifer August meant by "fraudulent situation."²⁹ But Eder, I conclude, full well knew why Jennifer August was upset, and refused to discuss, much less offer to remedy, the problem. After this conversation, on April 4, Jennifer August recorded another lis pendens against the Property, this time indexed against Eder's name. Jennifer August also wrote a letter to Tarrant asking him if he represented Eder so that Jennifer August could properly notice him if necessary.³⁰ This letter went unanswered.

E. Eder Attempts To Sell The Property

On April 20, within weeks of receiving the Quitclaim Deed, Eder listed the Property for sale through a real estate agent.³¹ The decision to do this originated from

²⁷ This phone call was recorded by Jennifer August and an official transcript of it appears in the record at DX-6.

²⁸ Tr. at 3.

²⁹ Tr. at 24.

³⁰ PX-14 (letter dated April 5, 2007).

³¹ JX-18.

David August, who clearly expected Eder to help coordinate the logistics. According to Eder, “[David August] did not want the house to go into foreclosure, and . . . he suggested *that we sell the house* and give the proceeds to the children.”³² Based on testimony, as well as Eder’s level of involvement in her son’s affairs both before and after the attempted sale of the Property, I surmise that Eder was working with, rather than independently from, David August in this endeavor. And, in further evidence of Eder’s active role in the sale of the Property, Eder also communicated with David August’s lawyer, Tarrant, regarding the sale of the Property.³³

Unfortunately for all parties involved, the listing of the Property came at a time when real estate markets were weakening nationwide. The Property was on the market for several months before Eder found a potential purchaser. That purchaser entered a sales contract for the Property with Eder in July for a sales price of \$315,000, which was lower than the original listing price of \$339,000, but still above the \$243,000 needed to pay off the WaMu Mortgage and cover closing costs, indicating there was some equity in the Property at the time.

But, before Eder could close the sale, the cloud on the title created by Jennifer August’s *lis pendens* had to be addressed in a way acceptable to the buyer. Jennifer August was first contacted about lifting her *lis pendens* in a letter written by Tarrant on

³² Tr. at 60 (emphasis added).

³³ At trial, Eder was evasive as to the level and content of her interactions with Tarrant. But, there is firm evidence that Eder phoned Tarrant at least once between the time the Quitclaim Deed was recorded and the Property was listed. PX-5. And, at trial, Eder conceded that she had discussed the sale of the Property with Tarrant. Tr. at 59, 84, 90.

July 16, 2007 (the “Tarrant Letter”).³⁴ Tarrant wrote the Letter at the request of Irving August and with Eder’s knowledge, and, I find, full support.³⁵ In the Letter, Tarrant disclosed that “[t]here is currently a buyer at a sale price of \$315,000.00. If the property were to be sold at that price, the proceeds[] (exclusive of Ms. Eder’s second mortgage) would be approximately \$49,000.00.”³⁶ Tarrant then proposed the following:

(a) you release any claims you have against this property so that it may be sold for the above described price. Your claims by agreement would attach to the net proceeds of sale.

(b) the net proceeds of \$40,000.00-\$49,000.00 described above would be held in an escrow account (ideally interest-bearing) pending final court rulings on the validity of your claims vis a vis this property.

(c) the net effect of this approach would be to exchange the real estate for a sum of money and *hopefully avoid the necessity of Ms. Eder foreclosing her second mortgage and/or taking other legal action to the possible detriment of all interested parties.*³⁷

³⁴ JX-12. Before this letter, there were two other communications between Jennifer August and Eder regarding the Property after the April 1, 2007 telephone call. The first was a voicemail Jennifer August left for Eder on April 17 saying “[Y]ou and I need to resolve this . . . it’s a real, real simple issue.” DX-6. In the ensuing telephone conversation, Eder again avoided discussing the issue of the Property by again acting as if she did not understand why Jennifer August was upset. Tr. at 154, 156-57. The next communication was an email Jennifer August sent Eder on June 20. In the email, Jennifer August informed Eder that, “David told the girls you own their home. . . . I am asking you to reconsider that action, as I had two legal claims to it at the time of the first conveyance in April 06, and that is the only asset to cure some of the obligations.” PX-24. Eder did not respond to this email.

³⁵ Tr. at 169. Eder’s relationship with her ex-husband was a friendly one, and the two were in contact regularly regarding their son’s legal troubles. For example, Eder called Irving August within hours of her April 1, 2007 phone call with Jennifer August. PX-29. Irving August also asked for Eder’s financial assistance in paying David August’s legal bills, which Eder provided. Tr. at 67-68.

³⁶ JX-12. The proceeds were calculated by subtracting the WaMu Mortgage payoff of \$243,148 and estimated fees and taxes of \$22,050 from the purchase price. Tarrant appears to have rounded down from the \$49,800 figure that this arithmetic yields.

³⁷ *Id.* (emphasis added).

At trial, Eder (unconvincingly) claimed she never authorized Tarrant to threaten to foreclose on the Second Mortgage.³⁸ But, once that threat had been made, Eder took no steps to inform Jennifer August that she did not intend to remove part of the Property's value from Jennifer August's reach through the Second Mortgage, and, in fact, as discussed below, endorsed more correspondence asserting Eder's rights in the Property.

Jennifer August responded to the Tarrant Letter on the same day.³⁹ In her response, which was copied to Eder, she noted that David August's support arrearages were at \$25,000 and claimed that the Second Mortgage and any ensuing sale were subject to the UFTA. Jennifer August concluded with the following request:

Please ask your client(s) to submit as soon as possible in a written agreement for complying with the debt satisfaction of my valid and undisputed claims, either through using the unencumbered title to this asset or otherwise, so this litigation may end. The offer you propose today leaves a *negative th[ir]ty thousand dollars of "net proceeds" to satisfy my claims before my claims are factored in*. Clearly I won't extinguish my own claims.⁴⁰

This language indicates that Jennifer August understood the Tarrant Letter to mean that Eder intended to collect on the Second Mortgage, an impression that, as noted previously, Eder never corrected despite her testimony at trial that she never intended to act on the Second Mortgage.

Eder continued to seek Irving August's help in disposing of the Property in accordance with David August's interests, and the next correspondence sent to Jennifer

³⁸ Tr. at 124.

³⁹ PX-15.

⁴⁰ *Id.* (emphasis in original).

August was a July 31 letter written by Irving August at Eder's behest (the "Irving August Letter").⁴¹ The Letter informed Jennifer August that Eder held both the Second Mortgage and the Quitclaim Deed on the Property, and it outlined several possibilities for resolving Jennifer August and Eder's competing claims. The dog's breakfast of proposals were:

1. You both can transfer your claims to the proceeds of the sale, sell the house, and leave the proceeds held in escrow with the Title Company, and let a Court decide who gets what; or
2. *Sally starts a lawsuit to quiet title and void your lis pendens or you start an action to enforce your lis pendens, and void Sally's mortgage and deed; or*
3. You and Sally allow the house to be sold and agree on what happens to the proceeds and how they are applied to child support and alimony; or
4. Do nothing, Sally stops paying the mortgage, the bank forecloses and both you and Sally get nothing; or
5. Any alternative you believe exists.⁴²

Irving August also offered to act as an intermediary between Jennifer August and Eder: "My sole interest is to protect the interest of the children. . . . I believe I can talk Sally into allowing the proceeds to be applied to child support, alimony, and/or a college fund."⁴³ Eder followed up on the Irving August Letter with a brief note to Jennifer August sent August 18 stating:

You recently received a letter from Irving which included various options with regard to the [Property]. I have endorsed all those options so that my grandchildren can receive whatever equity from the house. I am also open to solving this situation very positively with your options for this issue.⁴⁴

⁴¹ JX-23.

⁴² *Id.* at 2 (emphasis added).

⁴³ *Id.*

⁴⁴ JX-25.

This, in my view, is a strange endorsement because several of the options proposed by Irving August threatened litigation or other impairment of Jennifer August's rights. Irving August's second proposal was for Eder to start an action to quiet title. His fourth proposal was to let the house go into foreclosure so that "both [Jennifer] and [Eder] get nothing," implying Eder expected to get something out of the sale in the first place. By endorsing all of the proposals in the Irving August Letter, Eder created confusion and did not clearly retract Irving August's attempt to create leverage where it did not rightfully exist. In fact, even if read as an expression of concern that any proceeds be used for her grandchildren, Eder still was asserting leverage — via her possession of the Quitclaim Deed and the Second Mortgage — to direct how and when her grandchildren might benefit from those funds.

Notably, none of the people who contacted Jennifer August — Tarrant, Irving, August, or Eder — proposed the most direct means of addressing an obviously fraudulent transfer: a simple offer to rescind the Quitclaim Deed and cancel the Second Mortgage. Rather than accept any of the restrictive offers that were proposed to her, Jennifer August chose to leave the *lis pendens* on the Property and pursue her claims in this court. She instituted this action on August 24 seeking relief under the UFTA against David August, his company, Sally Eder, and Anthony Morabito, a friend of David August's to whom Jennifer August alleged David August fraudulently conveyed personal property.

On notice of the complaint filed against her, Eder stopped making payments on the WaMu Mortgage and for utilities and landscaping. At trial, Eder testified that she was frustrated that the sale had been thwarted, no longer wanted to put money in the Property,

and “just wanted to be done with it.”⁴⁵ This desire to “just be done with it,” however, did not translate into Eder’s immediate execution of a quitclaim deed in favor of David August. Nor did it end Sally Eder’s involvement with David August’s affairs.

F. Eder’s Continuing Involvement In David August’s Affairs

While this action was proceeding in this court, Eder was in contact with David August and working with then-defendant Anthony Morabito to secret assets out of the United States. Although this behaviour is not the subject of claims against Eder, it illustrates her willingness to help David August avoid his legal obligations.

In October 2007, Jennifer August learned that David August’s vehicle, a Toyota Avalon, had been removed from the Property and had been transported to Port Elizabeth, New Jersey, where it was awaiting shipment to David August in Israel. Jennifer August sought relief from the Superior Court, and under that court’s orders, the Avalon was seized and liquidated, and the proceeds were awarded to Jennifer August.

At trial, Eder admitted to her involvement with the transportation of the Avalon. According to her, she referred David August to a shipping company and David August made the arrangements while Eder acted as the U.S. contact person for the shipping company.⁴⁶ On October 19, the shipping company emailed Eder a dock receipt and instructions for what the driver of the vehicle would have to do to drop the Avalon off at the port.⁴⁷ Eder testified that she was not involved in arranging a driver, but simply gave the dock receipt to David August or Morabito. On this point, the record indicates that

⁴⁵ Tr. at 117.

⁴⁶ Tr. at 94-95.

⁴⁷ PX-34.

Eder had fairly frequent contact with Morabito during this time period. According to Eder's phone records, Eder called Morabito briefly on October 19, the day she received the dock receipt and the day of the first hearing in the Superior Court on Jennifer August's levy action.⁴⁸ Over the next few weeks, through late November, Eder and Morabito called each other on over a dozen occasions, generally on the day of a judicial proceeding in the Superior Court or when the Avalon was being moved. These calls, I find, were in aid of their joint effort to assist David August in avoiding his legal obligations to Jennifer August.⁴⁹ For example, there was a particularly concentrated flurry of phone calls on October 29, the day the Avalon was purportedly delivered to Port Elizabeth, and Eder and Morabito also spoke several times on November 16, the day the Superior Court issued orders relating to the transfer of the Avalon's title to Jennifer August and its release from the Port Authority.⁵⁰

Also in October 2007, Jennifer August learned that the Property had been stripped of its major appliances, including condenser units and air handlers that were part of the HVAC system, the refrigerator, the stove and range hood, and the washer and dryer.⁵¹ Reasonably believing this to be the work of Morabito, who Eder testified had helped her "clean up" the Property to prepare it for sale,⁵² Jennifer August filed complaints against

⁴⁸ PX-29.

⁴⁹ At trial, Eder's counsel suggested that Morabito and Eder were friends. Tr. at 340-41. On the stand, Eder herself acknowledged that she had never met Morabito in person. Tr. at 93. This contrived "friendship" theory was a weak excuse for the truth, which is that Eder and Morabito were bonded only by their mutual willingness to help David August avoid his legal duties by moving his assets beyond the reach of his creditors.

⁵⁰ PX-29; PX32.

⁵¹ The estimated value of these items is \$10,100-12,200. JX-29.

⁵² Tr. at 93.

Morabito in Superior Court and as part of this action, all of which have now settled. Eder claims she was not involved in this wrongdoing, and Jennifer August did not present any evidence to the contrary. Eder did, however, testify that either she or David August filed an insurance claim on the missing items,⁵³ indicating that Eder continued to play an ongoing role in helping David August manage the Property from abroad.

G. The Proceedings So Far

Some of the issues raised by the conduct of David August and Eder have already been resolved through the actions of the parties or earlier orders of this court.

Most saliently, in October 2007, Eder finally acted in accordance with her professed desire to “just be done with it,” and quitclaimed the Property back to David August.⁵⁴ Then, in March 2008, after David August’s repeated failures to appear before this court, I entered an order of default judgment against him in the amount of Jennifer August’s ascertainable claims at the time, which was \$58,307.74, plus costs and interest (the “Default Judgment”). The effect of the Default Judgment was that David August lost standing to challenge the factual assertions of the complaint.⁵⁵ As a result, the quitclaiming of the Property from David August to Eder was conclusively deemed a fraudulent transfer as to him only. Eder, in this proceeding, has conceded that the

⁵³ Washington Mutual received a check in the amount of \$4,700 dollars in compensation for them.

⁵⁴ Tr. at 117.

⁵⁵ See *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 2003 WL 21555325, at * 3 (Del. Ch. July 8, 2003); *Gebelein v. Four State Builder*, 1982 WL 17829, at *1-2 (Del. Ch. Oct. 8, 1982); see also 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2684 (2008) (“When a judgment by default is entered, it generally is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as between the parties as a judgment rendered after a trial on the merits.”).

Quitclaim Deed effected a fraudulent transfer, and has chosen not to defend its legitimacy.⁵⁶

As part of the Default Judgment, Eder was directed to record the deed that transferred ownership of the Property back to David August, which she did, and Jennifer August was awarded the right to exercise any rights of ownership needed to maximize her recovery from the Property, subject to the rights of Washington Mutual as a senior mortgage holder. In May 2008, Jennifer August received an offer on the Property for \$250,000. This amount was not enough to satisfy the WaMu Mortgage payoff amount at the time, and Washington Mutual refused to authorize a short-sale. According to Jennifer August, no other offer has been made on the Property, and Jennifer August has therefore been unable to realize the money awarded to her in the Default Judgment.⁵⁷

⁵⁶ See Def.'s Post-Trial Ans. Br. at 4. It would not have been difficult to find the deed transfer to be fraudulent on the undisputed facts presented at trial that David August was insolvent at the time of the transfer, he had absconded, he had made the transfer to a close relative, and the transfer was not made for reasonably equivalent value. See 6 Del. C. § 1304(b) (listing each of the above circumstances as badges of an actual intent to defraud creditors). And, because the record supports the inference that David August transferred the Property with an actual intent to defraud his creditors, I reject Eder's argument that Jennifer August brought her claim too late under the UFTA. Eder argues that this situation is controlled by § 1305(b), which applies to transfers to insiders made for antecedent debt, because David August recorded the Second Mortgage in consideration of the money Eder had given him. Under § 1309, such claims must be brought within one year of the transfer, so Eder argues that because Jennifer August brought her claim over a year after the Second Mortgage was recorded in April 2006, her claim is barred. But, because David August (and his accomplice, his mother, Eder) had an actual intent to defraud, this situation is instead controlled by § 1304(a)(1). Under § 1309, claims brought under that provision may be brought within four years.

Moreover, § 1305(b) does not control in this situation because there was no antecedent debt. Eder has vehemently maintained throughout this action that the money she gave David August to purchase the Property was a gift and not a loan. See, e.g., Tr. at 72, 126; see also Def's Post-Trial Op. Br. at 14 ("Throughout these proceedings, Eder has represented to this Court that she never intended to be repaid for her monetary gift to David August . . ."). Without a legitimate antecedent debt, § 1305(b) is inapplicable.

⁵⁷ Tr. at 234.

As a result of these dispositions, the question to be answered in this opinion is a relatively narrow one: what further equitable relief is Jennifer August, a creditor defrauded by a fraudulent transfer, entitled to recover from Eder, the recipient of that fraudulent transfer, now that the fraudulently transferred asset has been returned? I turn to that question now.

III. Legal Analysis

A. Remedies Under The Uniform Fraudulent Transfer Act

The UFTA provides remedies to creditors who are defrauded by debtors who transfer assets or incur obligations “[w]ith actual intent to hinder, delay or defraud any creditor of the debtor,” or, in certain circumstances, “[w]ithout receiving reasonably equivalent value.”⁵⁸ These remedies are broad and leave considerable space for the exercise of equitable discretion.⁵⁹ In addition to specific remedies such as avoidance and attachment, the statute provides that, “[s]ubject to applicable principles of equity . . . [a defrauded creditor may obtain] [a]ny other relief the circumstances may require.”⁶⁰

According to the committee that drafted the Uniform Act, its remedies are cumulative and non-exclusive.⁶¹ Moreover, our Supreme Court has recognized the

⁵⁸ 6 Del. C. § 1304(a).

⁵⁹ See *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 199 (Del.Ch. 2006) (“Both state law and federal law provide a panoply of remedies in order to protect creditors injured by a wrongful conveyance, including avoidance, attachment, injunctions, appointment of a receiver, and virtually any other relief the circumstances may require.”).

⁶⁰ 6 Del. C. § 1307(a)(3).

⁶¹ See UNIF. FRAUDULENT TRANSFER ACT § 7 cmts. 1, 6 (2008).

“broad latitude” a court in equity has to craft a remedy appropriate to the circumstances of a fraudulent transfer.⁶²

The overarching goal in applying these remedies is to put a creditor in the position she would have been in had the fraudulent transfer not occurred.⁶³ This principle stems from the concept that the recipient of a fraudulent transfer holds the asset in constructive trust for creditors, and is reflected in § 1308 of the UFTA, which allows a creditor to recover “an amount equal to the value of the asset at the time of the transfer, subject to the adjustment as the equities require” from a transferee.⁶⁴ This approach places the risk that market prices will change while the asset is in the hands of the transferee squarely on the transferee, subject to the equitable adjustment contemplated by § 1308.⁶⁵

With these considerations in mind, I turn to the question of what shape an appropriate remedy in this case should take.

⁶² See *Hogg v. Walker*, 622 A.2d 648, 652-54 (Del. 1993) (“Courts of equity have full jurisdiction to relieve against fraud or mistake, and that power extends to cases where a person has procured a deed to property rightfully belonging to another. . . . [T]he trial court has broad latitude to exercise its equitable powers to craft a remedy.”).

⁶³ This principle has been noted by a number of jurisdictions that also apply the UFTA. See *Fleet Nat. Bank of Mass. v. Merriam*, 699 N.E.2d 1266, 1268 (Mass. App. 1998) (“[T]he form of the relief should be so framed as ‘to place the judgment creditor in the same or similar position he held with respect to the fraudulent transferor prior to the fraudulent conveyance,’” (quoting *Damazo v. Wahby*, 305 A.2d 138, 142 (Md. 1973); *Miller v. Kaiser*, 433 P.2d 772, 775 (Colo. 1967))); *Foodland Distrib. v. Al-Naimi*, 559 N.W.2d 379, 392-93 (Mich. App. 1996) (quoting *Miller*).

⁶⁴ 6 Del. C. § 1308(c).

⁶⁵ See UNIF. FRAUDULENT TRANSFER ACT § 8 cmt. 3 (2008) (“The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor’s recovery.”).

B. Appropriate Remedy In This Case

1. Remedy Beyond Avoidance Of The Transfer Is Not Inequitable In This Case

Despite the broad and cumulative nature of the remedies for fraudulent transfer described above, Eder argues that Jennifer August has received the only remedy she is equitably entitled to in these circumstances, namely, the voiding of the transfer. Eder's claim is that equitable remedies are available only where a party is unjustly enriched through fraudulent, unfair, or unconscionable conduct, and because Eder was neither enriched by the transfer nor engaged in unfair or unconscionable conduct, she is not subject to further liability.⁶⁶ This argument misconstrues the nature of both the liability that a recipient of a fraudulent transfer bears and of Eder's own conduct.

In cases of improperly transferred assets, the recipient of the transfer need not have engaged in wrongful conduct in order to owe restitution to the third party who was the victim of the transfer.⁶⁷ This is true even where the asset and its identifiable proceeds have dissipated.⁶⁸ The reason for this is that the mere acceptance of the asset by the

⁶⁶ See Def.'s Pre-Trial Op. Br. at 8 (citing *Wilmington Sav. Fund Soc'y, FSB v. Kaczmarczyk*, 2007 WL 704937, at *3 (Del. Ch. Mar. 1, 2007) (stating the standard for imposing a constructive trust)).

⁶⁷ See, e.g., *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) ("Restitution is permitted even when the defendant retaining the benefit is not a wrongdoer."); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1063 (Del.1988); *Highlands Ins. Group, Inc. v. Halliburton Co.*, 852 A.2d 1, 8 (Del. Ch. 2003); *Smith v. Smitty McGee's, Inc.*, 1998 WL 246681, at *7 (Del. Ch. May 8, 1998); see also *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 673 (Del.Ch. 2006) ("I do not perceive there to be any rigid rule that the party who engaged in [the unfair or unconscionable] conduct must be the person against whom the order of constructive trust is sought.").

⁶⁸ See *Hogg*, 622 A.2d at 654 ("The fact that the res of the trust was dissipated does not foreclose an equitable remedy to make Hogg whole."); *Aidinoff*, 900 A.2d at 673 ("[T]he mere dissipation of the proceeds received from the plaintiff by the defendant does not render the defendant safe from and equitable remedy requiring economic restitution to the plaintiff.").

recipient works a wrong on the third party creditor by preventing the creditor from reaching an asset she could have otherwise used to satisfy her debts.⁶⁹

Moreover, Eder's claim that she was an innocent recipient of a fraudulent transfer that she tried diligently to rid herself of rings hollow in light of her own testimony and the evidence in the record regarding her involvement with her son's flight and with the Property. For starters, David August was with Eder when he was planning his evasion, he discussed it with her, and he left directly from her house in Florida. Eder helped her son in whatever way was needed to allow him to continue to avoid his obligations, from wiring him money to live on in Israel to helping him move the most valuable mobile asset he probably had, his vehicle, out of the country. And, she enlisted the help of two individuals with legal training — Tarrant and Irving August — to help her manage David August's largest non-mobile asset, and the most likely target for seizure once he left, his house.

Throughout these proceedings, Eder proved herself to be to be savvy in legal and financial matters when she wanted to be. For example, she claimed at trial that she asked David August when he wanted to transport his Avalon whether he had title to it and was allowed to ship it.⁷⁰ Although the part of the testimony about asking David August if he

⁶⁹ As stated in an often-cited passage of *Perry on Trusts*:

[P]roperty obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."

J. PERRY, 1 PERRY ON TRUSTS AND TRUSTEES §211 (7th ed. 1929).

⁷⁰ Tr. at 188-89.

was allowed to ship the vehicle lacks credibility, it illustrates that Eder is canny and fully capable of grasping the creditor-defrauding purpose of David August quitclaiming the Property to her.⁷¹ I therefore do not accept that Eder was unaware that her receipt of the Quitclaim Deed from her son, who she knew was insolvent and had fled the country to avoid his debts, was fraudulent as to Jennifer August or that she could not have promptly voided the transfer if she wished to do so.

Furthermore, Eder by no means acted with the alacrity or conscientiousness that one would expect of a person who does not want to be the owner of a fraudulently transferred asset. The Property was titled to Eder for over seven months. During most of that time, Eder acted as the owner, paying the WaMu Mortgage, maintaining the Property, and listing the Property for sale. Eder maintains that her sole goal in these actions was to secure the equity in the Property for the benefit of her grandchildren. That high-minded goal, however, was not what drove Eder. Indeed, Eder's actions endangered her grandchildren by helping to impoverish the sole parent who had not abandoned them, Jennifer August, and left their household with little income and few liquid assets.

Admittedly, the weight of the evidence is that Eder was not acting to benefit herself personally; rather, she was driven by the desire to help her son, by almost any means, defeat the claims of his ex-wife, an ex-wife toward whom Eder by then clearly had a deep animus herself. Eder's loyalty to her son, however, does not relieve her of culpability. The record supports the inference that Eder consciously wished to help

⁷¹ The part of the testimony about asking David August if he had title to the Avalon is more credible because that was useful in Morabito's and Eder's ability to successfully sneak the vehicle out of the United States for David August.

David August place the Property beyond the reach of Jennifer August's claims, claims that included child support arrears owed for the support of Eder's own grandchildren.

And although Eder claims to have wanted to use the Property to help her grandchildren, her own behavior belies that. There is no evidence that Eder contacted Jennifer August at any time during the months the Property was on the market to inform Jennifer August of her intentions with the Property or to attempt to satisfy the Superior Court Lien that Jennifer August held on it. It appears that the first time Eder or anyone acting on her behalf contacted Jennifer August about the Property was when Jennifer August's recorded claims became an obstacle to the sale of it. And, the communications that were made to Jennifer August were far from being open offers for Jennifer August to proceed on her claims in any way she wished, as Eder tries to characterize them now; they were highly conditional and at times threatening.

For example, the Tarrant Letter, the first letter sent to Jennifer August about the sale of the Property, threatens the possible "necessity of Ms. Eder foreclosing her second mortgage and/or taking other legal action to the possible detriment of all interested parties."⁷² Tarrant also informed Jennifer August in a telephone conversation that his fees in any future litigation would be taken out of the proposed escrow account.⁷³ And the next letter, the Irving August Letter, conditions Jennifer August's receipt of proceeds on Eder's approval of how they would be used. According to Irving August, he "believe[d] [he could] talk Sally into allowing the house proceeds to be applied to child

⁷² JX-12.

⁷³ Tr. at 260.

support, alimony, and/or a college fund.”⁷⁴ That same letter reiterated that *Eder might sue Jennifer August*, and attempted to use that leverage to get Jennifer August’s assent to a disposition dictated by Eder’s leverage, not Jennifer August’s rights. In that regard, the reference to “a college fund” is notable in that Jennifer August and her children were entitled to duly-ordered spousal and child support for the present, the there and then. The grandchildren had present needs to be met, and Eder was negotiating about what future wishes she *might* be willing to help be realized.

Eder, as the recipient of a fraudulent transfer, was in no position to haggle over how Jennifer August would use money she was already entitled to receive. And, just as important as what these letters contained, is what they did not contain. Nowhere in them is there even a clear statement that the proceeds of the sale would be used to satisfy the Lien that Jennifer August held on the Property. Even after it was clear that the sale would not go through, and Eder stopped paying for the WaMu Mortgage and maintenance, Eder still retained title to the Property for several more months instead of promptly returning it to David August.

In sum, Eder not only accepted a fraudulently transferred asset, which is all that is required to create transferee liability under the UFTA, but she also did so as a willing and active participant in David August’s plans to avoid his support obligations to his children and to Jennifer August. Eder is therefore subject to the full range of remedies that this court may enter against one who accepts a fraudulent transfer in order to provide full justice to the creditor defrauded by the transfer.

⁷⁴ JX-23 at 2.

2. Eder Is Liable For \$40,950 In Lost Equity In The Property

As discussed above, the key remedial goal in redressing a fraudulent transfer is to place the defrauded creditor in the same position she would have been in had the transfer not occurred.⁷⁵ In this case, two purported transfers occurred: the Second Mortgage in April 2006, before David August's flight; and the Quitclaim Deed in March 2007, after David August had become a fugitive. I focus my remedy here on restoring Jennifer August to the position she would have been in if the Quitclaim Deed and Second Mortgage had not impeded her attempt to extract value from the Property, a period that roughly began when David August fled and the Quitclaim Deed was executed. I choose that period because that is when Jennifer August first made an attempt to extract value from the Property. Up until then, Jennifer August was content to allow David August to continue living in the Property. Jennifer August's reasons for doing so were understandable — she did not want to foreclose on her children's second home⁷⁶ — and, as discussed below, I find that this period of forbearance does not support a laches defense. But, because Jennifer August herself did not attempt to actually capitalize on the value of the Property until early Spring 2007, and because there is only speculation regarding the value of the Property at any prior period, that time frame is the proper and equitable one to employ for remedial purposes. In other words, the period when Jennifer August first chose to actively assert her rights by confronting Eder, after David August's departure, and by indicating that she wanted her claims satisfied by the Property is when

⁷⁵ See *Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993).

⁷⁶ Tr. at 323.

the harm occurred, a date I approximate by using March 23, 2007, the date the Quitclaim Deed was recorded, as the basis for awarding relief.

In post-trial briefing, Eder makes the baffling argument that the Second Mortgage and the Quitclaim Deed did not harm Jennifer August, and, in fact, the Quitclaim Deed improved Jennifer August's position as a creditor. This unique argument hinges on the doctrine of merger and the rule that a deed in lieu of foreclosure, which is what the Quitclaim Deed declared itself to be, may extinguish the underlying mortgage.⁷⁷ Eder's argument is that the Quitclaim Deed extinguished Eder's Second Mortgage, making Jennifer August's Superior Court Lien the first priority lien after the WaMu Mortgage, and resulting in Eder taking the Property subject to the Superior Court Lien. In other words, Eder argues that David August did Jennifer August a favor by executing the Quitclaim Deed because it extinguished the Second Mortgage and moved Jennifer August ahead in priority, and thus any harm that came to Jennifer August was the result of Jennifer August's own failure to execute her perfected lien, and not the result of David August's and Eder's conduct.

This is a lawyer's argument strung together after the fact, and it ignores the very real harm that the Second Mortgage and the Quitclaim Deed caused Jennifer August after David August fled the country. The extinguishment effect of a deed in lieu of foreclosure is a legal tidbit that many practitioners would not be aware of in the first instance.⁷⁸ The two law-trained advocates who Eder enlisted to help her apparently did not understand

⁷⁷ See *PNC Bank, Delaware v. Philben, Inc.*, 1997 WL 717786 (Del. Super. Oct. 1, 1997).

⁷⁸ Notably, Eder's counsel represented a party in the case that he directs the court to as authority for the extinguishment effect of a deed in lieu of foreclosure. *See id.*

the extinguishment effect because they represented to Jennifer August that Eder held the Second Mortgage *and* the Quitclaim Deed, and suggested that both gave Eder rights in the Property that were possibly superior to Jennifer August's. When it mattered, the Tarrant Letter threatened that Eder would seek to foreclose on the Second Mortgage; that Eder's current lawyer now says this threat was hollow does not provide any equitable basis to relieve his client of liability. It would be unfair to Jennifer August to charge her, as a layperson, with technical legal knowledge when two people that she knew to be a current and a former lawyer were asserting that the Second Mortgage held by Eder remained enforceable, notwithstanding the Quitclaim Deed.

Eder's argument that the onus was on Jennifer August to hire counsel to determine her rights is also unpersuasive in these circumstances. As a direct result of David August's plot to avoid his obligations, Jennifer August had little means to hire counsel. Nor would she have been required to hire counsel had Eder not insisted on retaining title to an asset that, I find, Eder knew represented a fraudulent transfer. Jennifer August was acting as a layperson trying to defend her rights against legally sophisticated people, and she reasonably believed these people when they told her that her access to the equity in the Property was blocked by Eder's rights under both the Second Mortgage and the Quitclaim Deed. Eder cannot escape liability for her active role in accepting and retaining a fraudulent transfer by arguing that Jennifer August should have had the sophistication to see through a tangled legal situation that Eder herself helped create. As a result, I find that the Second Mortgage and the Quitclaim Deed did harm Jennifer August, a harm that entitles Jennifer August to a remedy.

If David August had not fraudulently transferred the Property, Jennifer August would have had access to the equity existing in the Property at the time of his departure. For her to realize that equity, the Property would have had to have been sold. I therefore look to the purchase price that was offered on the Property in July 2007 as the most reliable evidence in the record of how much equity was in the Property. Eder put the Property on the market in mid-April for \$339,000 and entered a sales contract in July for \$315,000. The delay in finding a buyer and the below-asking bid are not surprising given the general weakening in the real estate market at the time, and Jennifer August conceded at trial that the \$315,000 was a fair market price.⁷⁹ The estimated seller's closing costs for this transaction were \$22,050.⁸⁰ At the time, the payoff amount on the WaMu Mortgage was \$243,148.78.⁸¹ This left approximately \$49,800 in value that would have been available to Jennifer August had the transfer not occurred. I recognize, however, the fact that realizing that amount required an outlay of money. Eder paid \$8,850.67 in WaMu Mortgage and maintenance payments in order to keep the Property saleable until a purchaser could be found.⁸² Had Jennifer August been pursuing her claims in the absence of the fraudulent transfer, she would have had to make a similar outlay, or would have had to accept a lower price in a foreclosure sale. Thus, an equitable downward adjustment of the amount Jennifer August can recover from Eder, as contemplated by § 1307 of the UFTA, is in order. As a result, Jennifer August is entitled to recover

⁷⁹ Tr. at 264.

⁸⁰ This is comprised of \$12,600 in real estate commissions and \$9,450 in transfer taxes. JX-19 at 17.

⁸¹ JX-12.

⁸² JX-20; JX-21.

\$40,950 from Eder under the equitable principles outlined in the UFTA and our common law.⁸³

Because Eder has raised a number of equitable defenses to recovery by Jennifer August, I turn to these defenses now.

C. Equitable Defenses

Eder raises two equitable defenses. The first is based on the fact that Jennifer August refused to lift the lis pendens that blocked the sale of the Property for \$315,000 in July 2007 and prevented the realization of the \$50,000 in equity in it. The second is based on Jennifer August's failure to exercise her Superior Court Lien against David August at any point after obtaining it in September 2006. Neither of these circumstances renders the judgment inequitable in this case.⁸⁴

⁸³ In keeping with the requirement that a creditor cannot recover more from a transferee than the amount a creditor is owed, I note that this amount is considerably less than the \$58,307.74 that this court already determined Jennifer August was owed in the Default Judgment, not to mention all of the unpaid child and spousal support and interest that has accrued since then.

⁸⁴ Eder raised a third equitable defense in her Pre-Trial Opening Brief based essentially on an unclean hands theory. This claim was based on certain letters Jennifer August wrote various government agencies in Israel and New Zealand, where Eder believed David August intended to move to, asking them to deny him citizenship and medical licensing. Eder argues that this thwarted David August's ability to pay his debts himself. Although these letters may not be shining examples of exemplary behavior, I do not think they constitute conduct so reprehensible that relief should be denied to Jennifer August under the unclean hands doctrine, especially in light of the fact that David August had proved himself unwilling to pay his debts even when he was employed. See *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del.Ch. 2008) (“[U]nclean hands is a doctrine designed to protect the integrity of a court of equity, not a weapon to be wielded by parties seeking to excuse their own inequitable behavior by pointing out a trifling instance of impropriety by their counterpart . . .”). Moreover, given David August's flight from responsibility and the economic pressure he was exerting on Jennifer August, her conduct and frustration are understandable.

1. Failure To Lift The Lis Pendens

Without identifying a precise equitable theory or legal authority, Eder takes great issue with the fact that, despite the avenues of resolution proposed in the Tarrant and Irving August Letters, Jennifer August refused to lift her lis pendens on the Property and thereby thwarted its sale. It is true that a long-standing principle of equity is that “he who seeks equity must do equity.”⁸⁵ In appropriate circumstances, it is possible that a creditor who purposefully thwarted a defendant’s ability to undo a fraudulent transfer in order to increase the defendant’s liability as a transferee could be denied or receive limited equitable relief.⁸⁶ But, that is not what happened here.

At trial, Jennifer August testified that she understood the escrow offer but that she did not trust either the people offering it or the deal itself.⁸⁷ Based on the record, I believe Jennifer August had good reason to be hesitant. As discussed above, the offers contained in the Tarrant and Irving August Letters were highly conditional, and they asserted possible limitations on Jennifer August’s ability to recover, intermingled with threats by Eder to collect on the Second Mortgage. And, none of the letters offered to simply undo the fraudulent transfer by rescinding the Quitclaim Deed and the Second Mortgage. Instead, the offers had strings attached, like a requirement that Jennifer August and Eder agree on how Jennifer August would use proceeds she was already

⁸⁵ See *Nevins v. Bryan*, 885 A.2d 233, 248 (Del. Ch. 2005).

⁸⁶ See *Welshire, Inc. v. Harbison*, 91 A.2d 404, 408 (Del. 1952) (“It is elementary that he who seeks equity must do equity, and a suitor for equitable relief may be required to recognize any equity of his adversary, and any inequitable conduct of such a plaintiff may justify the withholding or conditioning of equitable relief.”).

⁸⁷ Tr. at 264-65.

entitled to collect. In these circumstances, where Jennifer August was presented with offers that she legitimately believed would result in her losing the ability to recover some or all of her claims on the Property, it was not inequitable for her to refuse them.

Moreover, our law recognizes that a court of equity cannot use equitable principles “to rewrite the plaintiff’s legal rights, or to prevent a plaintiff from asserting those legal rights in a court of law” and that “[c]onditions may not be imposed to deprive a plaintiff of his full legal rights unless they secure an equitable right belonging to the defendant, or unless they secure to the defendant some matter which the plaintiff is estopped to deny him.”⁸⁸ Here, Eder has not indicated how her equitable interests were harmed. She did not need to complete the sale of the Property to protect her interests as a fraudulent transferee; she was free to, at any time, return title to the Property to David August, making it available to his creditors. In other words, Eder — who I believe was in on the fraudulent transfer from the get-go — could have easily made things simple for herself and ended her involvement with the Property, but she never did so.

And, there is no indication that Jennifer August ever agreed to cooperate with a sale or otherwise led Eder to believe she was on firm equitable ground in retaining title and entering the listing agreement. In fact, the record shows that Jennifer August confronted Eder on more than one occasion and indicated that she planned to assert her claims on the Property. Eder thus proceeded in the face of the risk that Jennifer August’s claims would hinder the sale, placing Eder in a precarious position under our state’s

⁸⁸ *Vandeleigh Indus., Inc. v. Storage Partners of Kirkwood, LLC*, 901 A.2d 91, 98 (Del. 2006) (quoting *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49, 55 (Del. 1952)).

policy of holding recipients of a fraudulent transfer accountable to defrauded creditors. As a result, Eder's argument that it is somehow inequitable for her to bear the consequences of that decision is unpersuasive.

2. Failure To Execute The Superior Court Lien

Eder's second defense is that Jennifer August is barred from relief under the doctrine of laches because Jennifer August never attempted to execute the Superior Court Lien, which she had obtained on September 26, 2006, about four months before David August fled the country.

The doctrine of laches "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights," and bars a plaintiff from bringing an unreasonably delayed claim.⁸⁹ "The essential elements of laches are: (i) plaintiff must have knowledge of the claim and (ii) there must be prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim."⁹⁰

In this case, I see neither unreasonable delay nor prejudice to Eder. As Jennifer August testified at trial, she did not want to execute the Superior Court Lien immediately against the Property because it was her children's second home. For her to forbear on the Lien in light of that concern and at a time when David August was in the state and earning income does not mean she was slumbering on her rights.⁹¹ Nor do the six months

⁸⁹ *Whittington v. Dragon Group L.L.C.*, 2008 WL 4419075, at *3 (Del. Ch. June 6, 2008) (quoting *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

⁹⁰ *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000).

⁹¹ *See Dryden v. Estate of Gallucio*, 2007 WL 185467, at *6 (Del. Ch. Jan. 11, 2007) (taking into consideration a plaintiff's desire not to litigate against her former husband while he was

between David August's departure and Jennifer August's filing of this action indicate a failure to pursue her rights diligently. After the Quitclaim Deed was recorded, Jennifer August promptly made Eder and David August's counsel aware that she knew about the transfer and felt it was fraudulent. Her attempts to communicate with Eder and Tarrant about the Property that appear in the record seem to have gone unanswered, suggesting that part of the delay can be attributed to Jennifer August waiting for a response. And, in any event, Eder has not demonstrated that she was prejudiced by this purported delay. Based on their conversation in April 2007, Eder could not have reasonably been under the impression that Jennifer August would not seek to assert her claims on the Property. And, any arguable prejudice that has arisen from Eder's making approximately \$8,850 worth of WaMu Mortgage and maintenance payments on the Property has already been accounted for by adjusting the equity available to Jennifer August by that amount in the remedy detailed above. As a result, I find that Jennifer August's claims were not brought with unreasonable delay or prejudice.

IV. Conclusion And Final Judgment

For the foregoing reasons, I award Jennifer August a judgment against Sally Eder in the amount of: 1) \$40,950 in principal amount; 2) \$8,430.58 in pre-judgment interest, composed of simple interest at the legal rate of 11.25% fixed as of March 23, 2007; and 3) post-judgment simple interest at the legal rate accruing from the date of this judgment until the date of the satisfaction of this judgment. Costs are also awarded to plaintiff

undergoing cancer treatment in determining her five-year-old claim against him was not barred by laches).

Jennifer August. The outstanding liens Jennifer August holds on David August's property shall be reduced to the extent this judgment is satisfied. To the extent that Eder proves to this court by way of separate complaint that David August has satisfied all of his outstanding obligations to Jennifer August and her children, plus full payment of interest, she may seek to be relieved of the burden of the judgment in this case. IT IS SO ORDERED.